

THE FILED RATE IN PUBLIC UTILITY LAW: A STUDY IN MECHANICAL JURISPRUDENCE

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INTRODUCTION

Once this or that type of business is labelled "public utility,"¹ the modern law governing the subject falls into two grand divisions. As the special duties which society imposes are no longer left to common law statement,² the first is the reading of the legislative language prescribing the duties. These are cast in such general terms that this is largely fictional interpretation in the light of current social theory.³ Statute-makers recognize, perforce, the human incapacity to prevision the myriad and kaleidoscopically-changing fact situations which arise⁴ and which must be met, not on any theory of precedents, but on their

¹ See the writer's *The Public Utility Concept in American Law* (1928) 41 HARV. L. REV. 277, for the history and the processes of the labelling.

² Forty-seven states have public utility acts; only Delaware was without one. See Note (1926) 25 MICH. L. REV. 178. In 1927 the National Conference of Commissioners on Uniform State Laws tentatively adopted a Uniform Act drafted by Professor E. B. Stason of Michigan. PROCEEDINGS OF THE THIRTY-SEVENTH ANNUAL MEETING (1927) 721. It does not include the regulation of steam railroads, and it is largely concerned with the agency for, and mechanics of, regulation. The duties of the utilities are stated—and properly—in the usual general terms, and occupy only three pages out of forty-one.

³ GRAY, NATURE AND SOURCES OF THE LAW (2d ed. 1921) 124, 172, deals with the statute as material for law to be worked out by the courts. This is particularly true in the public utility field. R. T. Ely, in PROPERTY AND WEALTH, at 206, discusses the judicial function in like terms.

⁴ The proposed Uniform Law, *supra* note 2, simply recites:

"SECTION 2. [Rates] . . . Every rate made, demanded or received by any public utility shall be just and reasonable. . . ."

"SECTION 3. [Service] . . . Every public utility shall furnish adequate, efficient, and reasonable service." Section 4 provides that every utility shall file and publish rates; section 5, that none shall depart from them; and section 6, that none shall as to rates or service make any unreasonable preference.

These wordings are typical of the statutes actually in force. Their vagueness has been in many cases subjected to attack as defining no standard for administration, but as the late Justice McKenna replied, in a case famous in the history of administrative agencies, "general terms, get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct. The exact specification of the instances of their application would be as impossible as the attempt would be futile. Upon such sense and experience, therefore, the law properly relies." *Mutual Film Corp. v. Industrial Comm.*, 236 U. S. 230, 246, 35 Sup. Ct. 387, 392 (1915) (censorship).

own circumstances.⁵ "Interpretation" thus comes close to "social engineering."

The second has to do with the attainment of the results intended. Though commensurate attention has not always been given in other lines to making legal rules effective,⁶ our present society has devised, in the commission, a special agency for making, in the utility field, "law in book" a "law in action." The reading of the legislative intentions and their effective carrying out are alike affected by traditions of free business and of free contract. And traditions of general individualism, and of fair play between the citizen and the state, combine with traditional dreads of a discretion which only the expert can check up, to affect particularly the enforcement phases. In both divisions, therefore, "constitutional law" bulks large.

The present paper concerns society's intention that public utilities shall deal with their customers on a basis of equality of treatment, and devotes itself to that current device for securing its accomplishment which is, in a measure, a throw-back to what an eminent legal philosopher calls the period of "strict law."⁷ Therein the chief end of law was certainty; rules were wholly inelastic and inflexible, and formalism reigned. It reigned as the "twin sister of liberty," as Jhering said, because it paid its way in compensations. The present device is tolerable for like reasons. It represents a choice of what is rated the lesser evil.

In itself it is simple enough. It is that the utility's charges be publicly filed,⁸ and be stuck to. The mechanical application

⁵ "The commission and the utility are not dealing with a purely legal proposition subject to inflexible rules of law, but with an ever-changing economic condition, with powers adapted to fit recurring changes in economic life." Kephart, J., in *Coplay Co. v. Public Service Comm.*, 271 Pa. 58, 64, 114 Atl. 649, 651 (1921).

⁶ See Pound, *The Enforcement of Law* (1909) 20 GREEN BAG 401.

⁷ See Pound, *The End of Law as Developed in Legal Rules and Doctrines* (1913) 27 HARV. L. REV. 195, 204.

⁸ The Interstate Commerce Act, 24 STAT. 380 (1887), as amended, 25 STAT. 855 (1889), 34 STAT. 586 (1906), 41 STAT. 483 (1920), 49 U. S. C. § 6 (1) (1926), reads: "Every common carrier subject to . . . this chapter shall file with the commission . . . and print and keep open to public inspection schedules showing all the rates, fares, and charges . . ." The act also provides, 34 STAT. 587 (1906), as amended, 41 STAT. 483 (1920), 49 U. S. C. § 6 (7) (1926): "No carrier . . . shall engage . . . in transportation . . . unless the rates, fares, and charges . . . have been filed and

adds "stuck to regardless of the moral deserts involved in the circumstances." Intrinsically, as a device for equality of treatment, it has nothing to do with the amount of the charge; but when, as part of the enforcement of the utility's duty to serve at reasonable rates, public regulation sets the actual figures,⁹ they serve as did those set by the utility.

Leaving its "reasonableness" aside, a rate once filed and published establishes a most-neatly-to-be-administered bit of mechanism for combating discrimination. It serves as a common denominator among customers, and as a yardstick wherewith regulations and litigation measure off the utility's treatment of them. Charging them with notice¹⁰ of its figures makes it a boomerang against the customers, themselves, in the cases where it has been applied to filed limitations of liability.¹¹ Its mechan-

published . . . ; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation . . . than the . . . tariff filed." The Elkins Act § 1, *infra* note 15, makes the carrier's "willful failure to file and publish," or "strictly to observe," a misdemeanor and adds, "and it shall be unlawful for (any carrier or shipper) to offer, grant or give, or to solicit, accept, or receive any rebate, concession, or discrimination . . . whereby any . . . property shall by any device whatever be transported at a less rate than . . . the tariffs filed . . ." The filed rate "as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed an offense under this section . . ."

The Uniform Act § 5, *supra* note 2, at 740, provides: "No public utility shall directly or indirectly, by any device whatsoever . . . charge, etc., a greater or less compensation . . . than that prescribed in the schedules . . . filed . . ." The note to it adds that the provision is in practically all of the statutes and was originally taken from the Interstate Commerce Act.

⁹ This has precipitated a major politico-economic controversy. Theoretically society's presumably primary interest in good service should make it willing to pay what good service costs. But there is more political capital in crying down rates than in crying up service; and the public setting or sanctioning of rates comes close to an experiment in finding the least financial bait which will keep private investment in the public utility field. For an expository treatment of the subject, see the writer's *The Valuation War* (1928) 6 N. C. L. Rev. 243.

¹⁰ "The tariff, so long as it is of force, is, in respect of rates named, to be treated as though it were a statute, binding as such upon railroad and shipper alike. *Penna. R. R. v. International Coal Co.*, 230 U. S. 184, *Robinson v. B. & O. R. Co.*, 222 U. S. 506 . . ." *Pillsbury Flour Mills v. Gt. Northern Ry.*, 25 F. (2d) 66, 68 (C. C. A. 8th, 1928).

¹¹ In *Boston & Maine R. R. v. Hooker*, 233 U. S. 97, 34 Sup. Ct. 526 (1914), a traveller stubbornly fought, up to the highest court, only to be there informed that the \$100 limitation as filed determined the amount of recovery. A note in (1914) 27 HARV. L. REV. 737, says, "This seems a startling result," but the Supreme Court impressed it again in *Galveston, etc., Ry. v. Woodbury*, 254 U. S. 357, 41 Sup. Ct. 114 (1920), as to a baggage loss. And in *Western Union Tel. Co. v. Esteve Bros.*, 256 U. S. 566, 41 Sup. Ct. 584 (1921), in applying it to unset

ical administration has resulted in making it a bed of Procrustes, wherein "John Doe suffers for the good of the Commonwealth," in that customers have suffered from the policy of not charging to the utility the cost of its blunders. These instances, where the customer and the utility are not together engaged in a design to defeat the equality doctrine, furnish the interesting examples of the mechanical application of the filed-rate policy.

NON-NECESSITY FOR PARTICIPATION OF CARRIER AND SHIPPER IN DISCRIMINATION

In the matter of allowances by the utility for work done by the customer¹²—over which the watch dogs of the non-discrimination policy are necessarily vigilant—an elevator concern was recently convicted of discrimination under circumstances which are peculiar. In *U. S. v. Spencer Kellogg & Sons*,¹³ the latter in their business received grain from Great Lakes vessels and loaded it upon cars. For their services the carriers' filed tariff gave them one cent per bushel.¹⁴ This they "split" with the owners of the grain. The business purpose was of course to divert the grain stream to and through their elevator. An indictment, which relied upon this division as a rebating "device" under the act, was demurred to by the Kelloggs, because they

a verdict for \$31,000 damages in favor of a limitation of \$465, the Court reached a result so startling, that the Commerce Commission raised the limitation figures.

¹² The Interstate Commerce Act, 34 STAT. 590 (1906), as amended, 36 STAT. 553 (1910), 49 U. S. C. § 15 (13) (1926), reads: "If the owner . . . renders any service connected with transportation . . . the Commission may . . . determine what is a reasonable charge . . . to be paid by the carrier."

¹³ 12 F. (2d) 612 (W. D. N. Y. 1926), *aff'd*, 20 F. (2d) 459 (C. C. A. 2d, 1927), commented on in (1928) 28 COL. L. REV. 507, certiorari denied, 275 U. S. 566, 48 Sup. Ct. 122 (1927).

¹⁴ Such an allowance was held to be proper, and not to be properly denied to an elevator owner who shipped his own grain, in *Interstate Commerce Comm. v. Dittenbaugh*, 222 U. S. 42, 32 Sup. Ct. 22 (1911). But in the present instance, the railroad refused to pay the one cent because, it argued, it would thereby subject itself to punishment under the Elkins Act. A New York court in *Kellogg & Sons v. D. L. & W. Co.*, 204 App. Div. 243, 199 N. Y. Supp. 951 (1922), required the payment. Of this the Circuit Court of Appeals said, 20 F. (2d) 459, 462 (C. C. A. 2d, 1927): "The civil liability there imposed . . . did not determine the criminal liability (of the Kellogg concern). The penalty is imposed here, not because it was acting for the carrier, but because it performed a service in transportation, and gave a rebate to its shipper . . . from the compensation received for that part which it performed."

were "not common carriers or agents of the railroad . . . (and) that they acted in their own interests. . . ." The act cannot be so narrowly construed, replied the trial court; and the Circuit Court of Appeals agreed that the relation to the carrier is not a necessary basis for responsibility.

The *Spencer Kellogg* case shows that the filed rate policy may be invaded, though the carrier itself is not involved, and that the carrier's filed rate may serve as a yardstick for the condemnation of at least a participant in the forwarding of the commodity, although the act reads that the filed "rate as against such carrier, its officers or agents . . . shall conclusively be deemed the legal rate . . . and any departure from such rate . . . an offence under this section" ¹⁵ In it there was no question as to the meaning of the tariff. The latter was understandable on its face, and its face revealed nothing to question. The business reasons of the elevator people were simply incompatible with the non-discrimination theory.

In a previous case the Supreme Court dealt with a filed rate schedule which on its face raised a question, in that it recited simply that from the rate stated a "lateral allowance" was made without stating its figures. The carrier made the allowance agreed upon, and was convicted of rebating. The court said:

" . . . no question of the defendant's good faith could arise. We may assume its intention to comply with the law, and its effort to ascertain its duty; but we cannot relieve it from the consequences of mistake." ¹⁶

When, however, the shipper was prosecuted under the *Elkins Act* for accepting the same "lateral allowance," his good faith saved him.¹⁷ Thus *mens rea* of some sort was required for con-

¹⁵ *Elkins Act*, 32 STAT. 847 (1903), as amended 34 STAT. 587, 588 (1906), 49 U. S. C. § 41 (1926).

¹⁶ *C. R. R. N. J. v. U. S.*, 229 Fed. 501, 509 (C. C. A. 3d, 1915), certiorari denied, 241 U. S. 658, 36 Sup. Ct. 446 (1916).

¹⁷ *Lehigh Coal & Navig. Co. v. U. S.*, 250 U. S. 556, 40 Sup. Ct. 24 (1919). The case is discussed in (1920) 33 HARV. L. REV. 606. "Good faith" in filing a blind tariff has more merit than good faith in other respects. In *U. S. v. Illinois Cent. R. R.*, 263 U. S. 515, 523, 44 Sup. Ct. 189, 192 (1924), the Court said: "The effort of a carrier to obtain more business, and to retain that which it had secured proceeds from the motive of self-interest which is recognized as legitimate; and the fact that preferential rates were given only for this

victing the shipper, but the carrier was convicted simply for not charging the tariff filed. The reason for this particular separability in the "lateral allowance" cases is not so clear.

One may rejoice, however, in the separableness in *U. S. v. Koenig Coal Co.*,¹⁸ where, on the theory that section 1 of the *Elkins Act* applied only when both shipper and carrier were participants in guilt, the trial court sustained a demurrer to the indictment.¹⁹ The circumstances evoke sympathy neither for the defendants nor for the lower court's theory. The facts were that the Commerce Commission had exercised its emergency authority²⁰ by giving preference, in a coal tie-up, to coal for the use of hospitals. The Koenig Coal Company designated as for the use of a named hospital in Detroit, a shipment wherewith to fill an order from a Detroit factory. This was the "device" relied upon in the indictment.

Upsetting the theory below, Taft, C. J., for the Court, said:

"This (section) makes it unlawful for any one to receive any concession . . . whereby any advantage is given or any discrimination is practiced. The facts charged bring what was done exactly within this description. It was a priority or preference in securing the transportation of coal in an emergency. . . . It was certainly a concession and one of value to one who under the law or the regulations having the force of law could not secure that priority . . . it was unlawful, and he (the carrier) did not know the facts which made it so. The shipper knew them because he had secured it by his deceit, and received it. What is there in the statute that releases him from guilt, because the carrier who yielded to him the concession and gave him the advantage and made the discrimination thought it was lawful?"²¹

purpose relieves the carrier from any charge of favoritism or malice. But preferences may inflict undue prejudice though the carrier's motives in granting them are honest."

¹⁸ 270 U. S. 512, 46 Sup. Ct. 392 (1926).

¹⁹ 1 F. (2d) 738 (E. D. Mich. 1924).

²⁰ Under the Act of 1920, 41 STAT. 476 (1920), 49 U. S. C. § 1 (15) (1926), which provides, by amendment to 40 STAT. 101 (1917), that the Commission may do so.

²¹ *Supra* note 18, at 518, 46 Sup. Ct. at 394. In *U. S. v. Michigan Portland Cement Co.*, 270 U. S. 521, 46 Sup. Ct. 395 (1926), decided on the same day, the facts were similar, but counsel was inspired to the defense that § 1

CONSTRUCTION OF FILED RATES

Whether to resolve in favor of shipper or of carrier the ambiguities of a tariff conceded to be properly filed was before the Circuit Court of Appeals in the Ninth Circuit in *Southern Pacific Co. v. Lothrop*.²² Although the filed tariff has the force of a statute in the sense of *ignorantia neminem excusat* in the matter of the amount of rates and of limitations of recovery for loss,²³ the court nevertheless favored the shipper, in a dispute as to which of two sections applied. "Admittedly it (the issue) is to be resolved by reference to the tariffs alone, and if they are ambiguous, they must be construed favorably to the shippers. . . . Furthermore, the intention of the carrier is competent only in so far as it is fairly expressed in the language of the printed rates." The Supreme Court denied a writ of certiorari.²⁴

In *Pillsbury Flour Mills Co. v. Great Northern Ry.*,²⁵ there is a general exposition:

of the Elkins Act, *supra* notes 8 and 15, had no teeth except as to "a concession or discrimination which violates a tariff published and filed," to which Taft, C. J., replied at 525, 46 Sup. Ct. at 396: "Service Order No. 23 herein was issued under the Transportation Act and had the force of law. *Avent v. United States* . . . 266 U. S. 127, 131 . . .; *United States v. Grimaud*, . . . 220 U. S. 506 . . . In the absence of a specific requirement for its publication in a tariff, either in the act authorizing the service order, or in the Elkins Act, we can find no reason for making it essential in the enforcement of the statute, and no case is cited to suggest one."

²² 15 F. (2d) 486 (C. C. A. 9th, 1926).

²³ See *supra* note 11. A recent case on the practice of making the owner a co-insurer with the carrier, in such a fashion that recovery is pro-rated, is *Mallison v. Barrett*, 215 App. Div. 524, 213 N. Y. Supp. 652 (1926), discussed in (1926) 40 HARV. L. REV. 128. The New York court required pro-rating. Although this is apparently becoming the general view, it is a regrettable and unnecessary extension of the limitation principle.

²⁴ 273 U. S. 742, 47 Sup. Ct. 336 (1927).

²⁵ 25 F. (2d) 66 (C. C. A. 8th, 1928). The carrier sued for an unpaid balance and won on the dispute as to which item of tariff applied to a shipment of bran "other than flax." Whether it fell under the rate for "bran, except flax bran," in list No. 2, or "feed, mill" in list No. 3, was the question. The variance was some \$300 in favor of list No. 2.

Nothing is said in the opinion of the possible aspect of the case as the basis of a reparation suit before the commission, with the necessity of its antecedent finding as an administrative question of which of the two sections should apply. But in *Ingalls v. Maine Cent. R. R.*, 24 F. (2d) 113 (D. C. Me. 1928), where there appeared the ever-arising question whether the shipment was a through interstate, or a combination of intrastate local hauls with a break at an intrastate point, the court found there was no break, and said, at 113: "The point is made by the defendants that this is an administrative ques-

"... the construction of a railroad tariff is not a matter *sui generis*. It 'presents ordinarily a question of law, which does not differ in character from those presented when the construction of any other document is in dispute.' *Great Northern Ry. v. Merchants' Elevator Co.*, 259 U. S. 285, 291. While there may be some rules of construction peculiarly applicable to a railroad tariff, yet ordinarily the rules governing the construction of other documents have been applied by the courts to such tariffs."

Neatly avoiding what the technically-minded might make a formidable question, the court added:

"Whether the tariff, being statutory in character, is to be treated as subject to the rules for the construction of statutes, or, being contractual in character, is to be treated as subject to the rules for the construction of contracts, we need not determine; for so far as the case at bar is concerned, the rules which are common both to the construction of statutes and contracts are applicable. . . . It is . . . an elementary rule of statutory construction that general and specific provisions in apparent contradiction may subsist together—the specific qualifying and supplying exceptions to the general."²⁶

It specifically repudiated the claim that in cases where more than one tariff designation might be applied the shipper is entitled to the lower rate.

tion, that should be decided by the Interstate Commerce Commission, and that this court, under the Commerce Act, has no jurisdiction. This suit, however, involves only a construction of the published rates of the carriers and their application to certain shipments. Here, as in the case of *Great Northern R. Co. v. Merchants' Elevator Co.*, 259 U. S. 285, 42 S. Ct. 477 . . . 'the task to be performed is to determine the meaning of words of the tariff, which were used in their ordinary sense, and to apply that meaning to the undisputed facts.' See also *Gimbel Bros. v. Barrett* (D. C.) 215 F. 1004.

"There were through rates established and effective, filed with the Interstate Commerce Commission, applicable to shipments of grain from points of origin in this case to Bridgeton. Where a through rate is in effect between two points, that is the only legal rate between those points under the Commerce Act."

²⁶ *Ibid.* 68. The court went on to hold that the bran shipped "was also a mill feed. But the term 'mill feed' included other commodities beside bran. 'Bran' was the specific designation; 'feed, mill,' the general designation. Both designations and both rates may stand, if we apply the first rule above stated and consider the specific commodity 'bran' as being excepted from the general class 'feed, mill.'"

FILED RATES AND "FREE CONTRACT"

A. Special Service Arrangements

What is a utility to do when service is asked for which no rate is on file? The *Interstate Commerce Act* tells the carrier he must "provide . . . transportation,"²⁷ but it also tells him he shall not "engage . . . in the transportation . . . unless the rates . . . upon which the same (the passengers or property) are transported have been filed and published. . . ." ²⁸ The cases have stressed the latter provision, and in *Texas & Pacific Ry. v. American Tie Co.*,²⁹ the shipper's suit for damages for the carrier's refusal to take and transport, failed.

Upon this dilemma the late Judge Hough took a characteristically direct grip in *Swift & Co. v. New York Cent. R. R.*³⁰ There was no tariff for a haul from "ship's side"—in this instance in Brooklyn—to a pier at the foot of Thirty-third Street, Manhattan. There was one for "ship's side" to Weehawken on the Jersey side of the Hudson (across from the foot of Thirty-third Street), and a second thence to the pier. The carrier collected the sum of the two filed rates. No physical reason existed why the transportation could not take the direct line, and shortly after the carrier filed a single rate for the direct service. The commission gave Swift & Co. the difference between this last and what they had paid, but the District Court dismissed the suit on the reparation order. In reversing, Hough, Cir. J., said:

"As it is not suggested that they could refuse the goods, or that they wished to refuse them, we shall assume that their duty as common carriers extended to the transportation of these goods. . . . If any ship within lighterage limits in New York Harbor was a 'point on its own route,' then it was obligatory under the statute to publish and charge a reasonable rate from that ship to any other point on defendants' line. But it does not follow that defendants had the impossible task of anticipating the arrival of ships and

²⁷ *Ibid.* 69. 24 STAT. 379 (1887), as amended, 36 STAT. 544 (1910), 40 STAT. 101 (1917), 41 STAT. 475 (1920), 49 U. S. C. § 1 (4) (1926).

²⁸ § 6 (7), *supra* note 8.

²⁹ 234 U. S. 138, 34 Sup. Ct. 885 (1914).

³⁰ 16 F. (2d) 17 (C. C. A. 2d, 1926).

the transportation from unexpected ships to unusual points of any and all cargoes, because, under subdivision 4 of section 1 the duty was to 'provide and furnish such transportation upon reasonable request therefore, and to establish through routes and just and reasonable rates,' etc. Comp. St. § 8563.

"It was perfectly possible, when the . . . request was made instantly to declare and publish a rate. . . . this litigation has arisen from a queerly legalistic way of looking at so broad and fundamental a statute as the Interstate Commerce Act. . . . because defendants were taken by surprise at a request for direct transportation to Thirty-third Street, they did no more than slavishly follow any existing routes, however circuitous, that would lead from the Brooklyn shore to Thirty-third Street, Manhattan. . . . 'We performed what seemed to be a very foolish service; yet we had no alternative,' (they say).

"There was an alternative; *i. e.*, the law not only permitted, but required, a tariff to be instantly proclaimed to suit the service which the defendants were willing to perform." ³¹

In the case just discussed the meat came through safely, but *Blodget & Co. v. New York Central R. R.*,³² presents the combination of a haulage undertaken for which no rate was on file, plus an injury to the goods in transit. Blodget asked for and was given a sound refrigerator car for the transport of celery in mid-December from Rochester, New York, into Massachusetts. The denial of recovery for freezing could actually have

³¹ *Ibid.* 18. In *Davis, Agent v. Kelly-Weber Co.*, 24 F. (2d) 708 (W. D. La. 1927), railroads under government control carried carload straw for delivery at Camp Hancock at Wheless, Ga., from interior Louisiana points. They charged intrastate carload rates, which were 10 cents per 100, to New Orleans, plus a through rate from New Orleans to Wheless, which was 30.5 cents. It appeared, however, that this combination had been previously cancelled, leaving carload rates only from New Orleans to Georgia. The railroad now sued to recover for the intrastate haul at less-than-carload rates, amounting to 65 cents per 100. Denying recovery, the court handled the situation commendably, but by main strength, simply saying, at 709: "However, I do not think this justifies the application of the exorbitant less than carload rate, which would have the effect practically of confiscation, or more than equal the value of the property shipped. Such a rule violates the principle that, where no other rates are published, the lowest combination of intermediate rates should be used, and I can see no more reason in the circumstances for applying the less than carload intrastate tariffs than there was for using those covering carload shipments."

³² 159 N. E. 45 (Mass. 1927); discussed in (1928) 28 Col. L. Rev. 666.

been put upon the point which the court makes that: "A carrier, in the absence of agreement to do so, is not bound to heat cars to protect perishable goods from freezing," and that as on the facts freezing might be expected the shipper "takes the risk himself." ³³

On the topic of the published tariff the court said:

"Not only was the defendant under no obligation to heat the car to protect the celery from freezing, but, under the provisions of the classifications and tariffs, it had no legal right to do so. . . . to furnish heat in cars would be to allow the shippers something which would affect the value of the service rendered without compensation therefor." ³⁴

In the very case the shipment suffered for lack of a provision which was not undertaken by the railroad. A question might arise if the shipper had wrongfully—in the sense that he was making an arrangement for special treatment in a matter in which the contract field is closed—asked for, and the carrier *had* undertaken to provide heat, and the injury to the celery had been due to lack of heat, or to, say, trainwreck or other matter unconnected with heating, would the situation be so illegal that the shipper's recovery would be barred? Does the filed tariff policy go that far?

Where the loss follows the not doing of an extra-tariff service actually undertaken, the well-known series of cases, of which *Chicago & Alton R. R. v. Kirby* ³⁵ is an example, furnishes an answer, at least where the damage is other than directly to the shipment during transit. In the *Kirby* case, the carrier's failure to give an expedited service resulted in the loss of a special market, for which damages were asked and denied. They arose directly out of the breach of the forbidden "contract." If the horses had died as a result of the length of the ordinary transit which they actually took, it would seem that the special contract would not bear on the matter one way or the other, and

³³ *Supra* note 32, at 47.

³⁴ *Supra* note 32, at 48. The provisions are given in the opinion.

³⁵ 225 U. S. 155, 32 Sup. Ct. 648 (1912).

it would not be necessary to talk of punishing Kirby by the loss of his horses for having made it. Had they been injured in the course of the journey in a manner which would ordinarily make the carrier liable, it is hard to believe that the filed rate policy requires that the law withdraw its aid from the parties entirely,³⁶ with regard to injuries in ordinary service, merely because they had made a forbidden contract for a service not given. Even where the injury, otherwise compensable, was the result of the performance of the special contract, it is hard to believe the filed rate policy goes so far as to deny recovery in such a case.

Yet in *Payne v. Bassett*,³⁷ a Texas court denied a recovery making the penalty substantially the forfeiture of the thing shipped, which in that case was silverware lost enroute, which had been shipped as "one box of cut glass," and contained in the box with some cut glass, as was explained to the carrier's local agent. There was no rate on file for silverware. The court said:

" . . . the law requiring a fixed and published rate establishes a public policy, and a contract to transport goods by freight expressly forbidden to be so transported and without a rate fixed and published, such transaction would be in contravention of public policy." ³⁸

In the analogous case of an individual riding "wrongfully" in the same sense, Pitney, J., said, in *Southern Pacific Co. v. Schuyler*:³⁹

"Whether the Hepburn Act prohibits a carrier from giving free transportation to the employees of the Railway Mail Service when they are not on duty but are travelling for their own benefit or pleasure, is of course a Federal question.

³⁶ In the Kirby case the carrier certainly could sue for the filed rate applicable to the service actually performed. Surely the Westinghouse Kerr case, discussed *infra* p. 227, does not bar that.

³⁷ 235 S. W. 917 (Tex. Civ. App. 1921). It is noted with approval in *Rights under Contracts in Violation of the Interstate Commerce Act* (1921) 22 COL. L. REV. 564. The writer points out that the "voidness" of the contract means that its specific performance may not be had; nor damages for its breach. These are settled points.

³⁸ *Supra* note 37, at 922.

³⁹ 227 U. S. 601, 610, 33 Sup. Ct. 277, 280 (1912).

"But whether . . . the relation of carrier and passenger arises in the case of gratuitous passage under circumstances such as are presented in this case, is (in the absence of an act of Congress regulating the matter) a question not of Federal but of state law.

"But the act itself declares what penalty shall be imposed for a violation of its prohibition. . . . This penalty is not to be enlarged by construction. Neither the letter nor the spirit of the act makes an outlaw of him who violates its prohibition. . . . The deceased no more forfeited his . . . right to the protection accorded by the local law to a passenger in his situation, than the carrier forfeited its right of property in the mail car upon which the deceased rode. His right to safe carriage . . . arose from the fact that he was a human being, of whose safety the plaintiff in error had undertaken the charge. With its consent he had placed his life in its keeping, and the local law thereupon imposed a duty upon the carrier, irrespective of the contract of carriage. The Hepburn Act does not deprive one who accepts gratuitous carriage, under such circumstances, of the benefit and protection of the law of the State in this regard."⁴⁰

Such instances as the *Kirby* case have been fairly frequent.⁴¹ It took a good bit of teaching to establish that under the filed rate theory prices and service in the utility field are "no longer a matter of private contract between the parties. . . ." ⁴² Most of the states agree with the federal courts in refusing to allow damages for breach, but South Carolina in a recent decision adopted the immediate business view.

⁴⁰In *Van Auken v. Michigan Cent. R. R.*, 182 Mich. 331, 148 N. W. 819 (1914); adversely noted in (1915) 13 MICH. L. R. 328; (1914) 2 VA. L. REV. 300; a divided state court held the traveller not a "passenger" and the company liable only for wilful injury. See also *Illinois Cent. R. R. v. Messina*, 240 U. S. 395, 36 Sup. Ct. 368 (1916), construing the Hepburn Act, 34 STAT. 584 (1906), 49 U. S. C. § 1 (1926), to the effect that an acceptor of a ride at the invitation of the engineer may be acting unlawfully while the giver railroad is not, and sustaining the Mississippi court's denial of recovery. The case is noted in (1916) 29 HARV. L. REV. 785; (1916) 16 COL. L. REV. 427.

⁴¹See *Davis v. Cornwell*, 264 U. S. 560, 44 Sup. Ct. 410 (1924), where the Supreme Court upset a recovery of damages for failure to supply cars at a set time under an "express contract." Notes (1924) 9 MINN. L. REV. 67; (1924) 3 TEX. L. REV. 93; (1922) 19 A. L. R. 982, show other cases.

⁴²*Pollock, D. J.*, in *Atchison, T. & S. F. R. R. v. Kinkade*, 203 Fed. 165, 166 (D. C. Kan. 1912).

In *Strock v. Southern Ry.*,⁴³ the court said:

"The recognition of the right of a shipper to make a contract with a common carrier for cars on a specified day for the transportation of his property is but the recognition of an orderly way of transaction of business. It enables the owner of property to know when to engage laborers for the purpose of assembling his property for shipment, and further enables him not only to make contracts with laborers in a businesslike manner, but it enables him to make contracts with parties at a distance for the sale and delivery of his property to be transported and delivered with some degree of certainty. Take this right away and you, to a great extent, deprive the shipper of a market for this property and thereby indirectly destroy his property, discourage the production of property, and paralyze business."

The filed rate policy as such is not mentioned. The South Carolina court discusses the case under a local act which contains prohibitions of preferences corresponding to those in section 3 of the *Interstate Commerce Act*. Until lately, at least, the federal cases treated the filed rate theory as a means to avoid preferences rather than an end in itself. In the *Kirby* case the Supreme Court said that "for breach of such a contract, relief will be denied, because its allowance without such publication (in the tariff) is a violation of the act. *It is also illegal because it is an undue advantage.* . . ." ⁴⁴

It is an "undue advantage," however, only if the shipper profits under it. Where he does not get what he arranged for, and gets no damages for not getting it, the non-discrimination policy is completely vindicated, so far as the civil side is concerned. But what if the customer has actually received the advantage "contracted" for and the carrier is in court seeking payment for it?

⁴³ 140 S. E. 470, 473 (S. C. 1927). Under the special contract the railroad was to place two cars at a named station each Monday from May to October. The cars were for logs which the plaintiff was cutting on adjoining land, and the breach alleged was that the railroad bunched the cars so that the plaintiff's cutting arrangements were upset. The complaint did not recite where the logs were going, but the court held that it would presume an intrastate haul. A note in (1928) 41 HARV. L. REV. 1069 considers the result questionable.

⁴⁴ *Supra* note 35, at 165, 32 Sup. Ct. at 650. The italics are the writer's.

In *Chesapeake & Ohio Ry. v. Westinghouse Kerr Co.*,⁴⁵ the railway was unable to "spot" cars of material consigned to a building concern. "To remedy this condition the engine and crew were assigned to the exclusive use of its traffic, payment to be made therefor as prescribed in the contract."⁴⁶ When the carrier sued to recover "for the use of the engine and crew rented," the Court said, per Brandeis, J.:

"... abnormal conditions may relieve a carrier from liability for failure to perform the usual transportation services, but they do not justify an extra charge for performing them. The carrier is here seeking compensation in excess of the tariff rate for having performed a service covered by the tariff. This is expressly prohibited by the *Interstate Commerce Act* (section 6) . . . A contract to pay this additional amount is both without consideration and illegal . . . To so insure performance to a shipper was an undue preference. Hence the contract would be equally void for illegality on this ground. *Davis v. Cornwell*, 264 U. S. 560."⁴⁷ Recovery was denied.

Thus the customer not only got a preference, whether or not he paid for it; but he was not required to pay for the advantage he got. The case presented the sort of dilemma to which mechanical jurisprudence leads. Under familiar cases, the filed rate theory makes the customer suffer from the blunders of the utility in quoting figures, in reliance on which he irrevocably concludes business dealings, which his later required payment of the filed rate turns into loss.⁴⁸ The customer also suffers from failure of the utility to carry out the special contract. The *Westinghouse Kerr* case maintains the symmetry of its mechanical application at the expense of the policy it was designed to vindicate. Surely the end should be more important than the means to the end.

It would more accurately comport with the objective of the law to confine judicial blindness to the contract to cases where

⁴⁵ 270 U. S. 260, 46 Sup. Ct. 220 (1926).

⁴⁶ *Ibid.* 265, 46 Sup. Ct. at 221.

⁴⁷ *Ibid.* 266, 46 Sup. Ct. at 221.

⁴⁸ *Supra* note 11, and *infra* note 71.

nothing has been accomplished under it. In instances like the present, the ultimate ends would be better served by enforcing the contract as made, and rigorously applying the criminal provisions against the violations of the non-discrimination doctrine.

That the customer and the utility must tread the straight and narrow way of the filed rate is thus established. That the Utility Commission itself must do so is the decision in a recent Missouri case. Although the Missouri Supreme Court, speaking by the sprightly Lamm, has read the Public Utility Commission's mandate and authority liberally,⁴⁹ it drew back from permitting what it felt was a commission-sanctioned discrimination. *State ex rel. St. Louis County Gas Co. v. Public Service Comm.*,⁵⁰ involved a statute which denied to the utility power "to extend to any person . . . any privilege or facility not regularly and uniformly extended to all."⁵¹ The commission ordered an extension of mains into a theretofore unsupplied district, on terms varying from those of the schedule. This, the court held the commission could not do.

"A schedule . . . filed . . . acquires the force and effect of law; and as such is binding upon both the corporation filing it and the public . . . It may be modified or changed only by a new or supplementary schedule filed voluntarily, or by order of the commission. Such is the construction which has been put upon analogous provisions of the Interstate Commerce Act . . . If such a schedule is to be accorded the force and effect of law, it is binding, not only upon the utility and the public, but upon the Public Service Commission as well. . . . it cannot set them (the schedules) aside as to certain individuals and maintain them in force as to the public generally. The gas company cannot (vary them). Neither can the Public Service Commission."⁵²

⁴⁹ *State v. Public Service Comm.*, 259 Mo. 704, 168 S. W. 1156 (1914), held it might set reasonable rates although thereby upsetting statutory rates. *State v. Public Service Comm.*, 270 Mo. 429, 192 S. W. 958 (1917), held it might override municipal powers of regulation lodged in the city by its charter.

⁵⁰ 286 S. W. 84 (Mo. 1926).

⁵¹ Mo. REV. STAT. (1919) § 10478 (12).

⁵² *Supra* note 50, at 86.

The peculiar difficulties of the fact situations involved in the extensions of mains,⁵³ where the future is so unpredictable in its details that the making in advance of detailed charges becomes an impossible task, necessarily imposes the granting of an authority to cope with novel situations on their individual terms. These considerations make the decision unfortunate. Moreover the prohibition of the statute is directed only against the utility. If the commission could—as was, of course, conceded—in a single motion make a new schedule covering all extensions, presumably it might also make a whole schedule over by leaving a part to stand while making anew another part. The result is a recession from the former attitude toward the commission's powers.⁵⁴

B. Non-protection of Contracts Made Prior to Filing of the Rates

The invalidity of "contracts" made since the filed rate policy is now clear. "Contracts" made prior to its establishment, and made without intention of discrimination at the time of their making, and legally made at that time, are a different phase. That they might be vehicles of discrimination later, when rate changes obliged others to pay more, took further teaching, and not all states accept it. The constitutional provisions against the impairment of contract have been invoked, but the United States Supreme Court's decision in *Union Dry Goods Co. v. Georgia Public Service Corp.*⁵⁵ proved them to be no refuge

⁵³ See *New York & Queens Gas Co. v. McCall*, 245 U. S. 345, 38 Sup. Ct. 122 (1917), and (1918) 27 YALE L. J. 715.

⁵⁴ The case is discussed in (1927) 11 MINN. L. REV. 284. The conclusion, however, is that the decision seems sound.

⁵⁵ 248 U. S. 372, 39 Sup. Ct. 117 (1919). See a valuable note on the topic in (1926) 24 MICH. L. REV. 492. That the "contracts" were made prior to the utility's actual engagement in the public business afterward entered into, did not save them in *Fort Smith Spelter Co. v. Clear Creek Oil & Gas Co.*, 267 U. S. 231, 45 Sup. Ct. 263 (1925), from being upset by a rate schedule subsequently ordered by a state commission, although *Texas, etc., R. R. v. Northside Belt Line*, 8 F. (2d) 153 (S. D. Tex. 1925), *aff'd*, 48 Sup. Ct. 361 (1928), held that the Interstate Commerce Commission did not have jurisdiction to grant or withhold a certificate of necessity for the building of a new road even though its constructor intended to engage in interstate commerce. As to interstate commerce, the theory of the filed rate and the requirement for

from the effect of public regulation, so far as federal prohibitions are concerned. There the local commission confirmed a newly filed rate, in excess of the figures of a "contract" having three years still to run. The consumer refused to pay the excess and sued for specific performance of the "contract." "Private contract must yield to the public welfare" is the gist of the decision. The cases make it clear that the public welfare may be declared either by statute, commission order, or even by the utility itself, in filing a new rate which the commission does not suspend.

The doctrine of the *Dry Goods* case is followed by the federal commission and courts,⁵⁶ and by most of the states, though questioned by some of the latter.⁵⁷ Some, indeed, have repudiated it by express legislation. In *Swift & Co. v. Columbia Gas & Electric Co.*,⁵⁸ the intrastate utility won on a contract although it dated from 1916, and it appeared that: "In 1919 the Public Service Commission (created in 1910) approved and put into effect a schedule of rates . . . which, however, made no provision for special rates for large users of power . . ." The court recites, also, that: "Some time prior to June 20, 1922, plaintiff (the utility) filed with the commission a schedule . . . containing the following statement: '. . . wholesale rate made by special contract.'"⁵⁹ No figures were given. The court said:

its payment in money defeats the contracts. See *Louisville & N. R. R. v. Mottley*, 219 U. S. 467, 31 Sup. Ct. 265 (1911), holding that a contract for a pass annually renewable during life entered into in consideration of a release for a personal injury claim, was unenforceable against the railway.

⁵⁶ See *New York v. U. S.*, 257 U. S. 591, 42 Sup. Ct. 239 (1922), where the Interstate Commerce Commission's rate orders defeated a "charter contract" of the railroad with the state. *Louisville & N. R. R. v. Mottley*, *supra* note 55; and *N. Y. C. & H. R. R. v. Gray*, 239 U. S. 583, 36 Sup. Ct. 176 (1916), dealt with private contracts with the carriers. They denied validity to the contract, but the Gray case sustained a money recovery for the service.

Interborough Rapid Transit Co. v. Gilchrist, 26 F. (2d) 912 (S. D. N. Y. 1928), is part of the attempt by the New York transportation system to escape from the five-cent fare. In the very case the New York Transit Commission of the Department of Public Service of the state was enjoined from interfering with the proposed raising of fares to seven cents, despite various contracts with the city, which, the court held, would yield to the requirement of the state utility acts that the rates be just and reasonable.

⁵⁷ *Schiller Piano Co. v. Ill. Northern Util. Co.*, 288 Ill. 580, 123 N. E. 631 (1919), 11 A. L. R. 460 (1921).

⁵⁸ 17 F. (2d) 46 (C. C. A. 4th, 1927).

⁵⁹ *Ibid.* 49.

"It was not a rate made to the public generally, to continue until changed, but was protected as a contract rate only for the life of the contract by the terms of the statute, which provided:

"That nothing contained in this act shall authorize the Railroad Commission to declare any rate, . . . contained in any contract heretofore voluntarily entered into for a term of years by and between any public utility and any person, . . . to be unreasonable, and non-compensatory, without the consent of both parties to said contract, said rates, . . . are hereby declared, for the life of said contracts to be reasonable and compensatory within the meaning of this Act.'" ⁶⁰

The *Arkansas Public Utility Act of 1921* shows a similar reaction in favor of protecting the contract, as appears in *Arkansas Natural Gas Co. v. Arkansas R. R. Comm.* ⁶¹

Where no interstate flavoring enters into the facts states are thus free to handle the matter as they will. But the injection of even a little of the magic "interstate" discloses an escape from state interference, ⁶² as was evidenced in *Public Utilities Comm. of Rhode Island v. Attleboro S. E. Co.*, ⁶³ where the contract, dating from 1917, covered service by a Rhode Island power plant to an Attleboro, Mass., wholesaler, who distributed the current there to ultimate consumers. Post-war costs created an operating loss on the service and the Rhode Island Commission ordered higher rates. This order the Supreme Court of Rhode Island upset, ⁶⁴ and on writ of certiorari the Federal Supreme Court agreed that the order was invalid, giving the same reasons as the state tribunal.

Speaking for the Court, Mr. Justice Sanford said:

⁶⁰ S. C. Acts 1922, 943 § 3.

⁶¹ 261 U. S. 479, 43 Sup. Ct. 387 (1923).

⁶² But not from federal interference when it enters the field. See *New York v. U. S.*, 257 U. S. 591, 42 Sup. Ct. 239 (1922), holding that a "charter contract" with the state for a two-cent per mile fare was subject to the Interstate Commerce Commission's authority to equalize state and interstate fares, under the doctrine of *Railroad Comm. of Wis. v. Chicago, B. & Q. R. R.*, 257 U. S. 563, 42 Sup. Ct. 232 (1922).

⁶³ 273 U. S. 83, 47 Sup. Ct. 294 (1927).

⁶⁴ 46 R. I. 496, 129 Atl. 495 (1925).

". . . the sale of electric current by the Narragansett Company to the Attleboro Company is a transaction in interstate commerce, notwithstanding the fact that the current is delivered at the state line. The transmission of electric current from one state to another, like that of gas, is interstate commerce, *Coal & Coke Co. v. Public Service Comm.*, 84 W. Va. 662, 669, and its essential character is not affected by a passing of custody and title at the state boundary, not arresting the continuous transmission to the intended destination. *People's Gas Co. v. Pub. Serv. Comm.*, 270 U. S. 550, 554.

"The petitioners contend, however, that the Rhode Island Commission cannot effectively . . . regulate the rates for electricity furnished by the Narragansett Company to local consumers, without also regulating the rates for the other service . . . , that if the Narragansett Company continues to furnish electricity to the Attleboro Company at a loss this will tend to increase the burden on the local consumers and impair the ability of the Narragansett Company to give them good service at reasonable prices; and that, therefore, the order of the Commission . . . should be sustained as being essentially a local regulation, necessary to the protection of matters of local interest, and affecting interstate commerce only indirectly and incidentally. In support of this contention they rely chiefly upon *Pennsylvania Gas Co. v. Pub. Serv. Com.*, 252 U. S. 23 . . . and the controlling question presented is whether the present case comes within the rule of the *Pennsylvania Gas Co.* case or that of the *Kansas Gas Co.* case . . . " ⁶⁵

He concluded: "It is clear that the present case is controlled by the *Kansas Gas Co.* case." ⁶⁶ There, on a similar fact situa-

⁶⁵ *Supra* note 63, at 86, 47 Sup. Ct. at 295.

⁶⁶ *Supra* note 63, at 89, 47 Sup. Ct. at 296. The Court says of these cases:

"In the *Pennsylvania Gas Co.* Case, the company transmitted natural gas by a main pipe line from the source of supply in Pennsylvania to a point of distribution in a city in New York, which it there subdivided and sold at retail to local consumers supplied from the main by pipes laid through the streets of the city. In holding that the New York Public Service Commission might regulate the rate charged to these consumers, the court said that while a state may not 'directly' regulate or burden interstate commerce, it may in some instances, until the subject-matter is regulated by Congress, pass laws 'indirectly' affecting such commerce, when needed to protect or regulate matters of local interest; that the thing which the New York Commission had undertaken to regulate, while part of an interstate transmission, was 'local in its nature,' pertaining to the furnishing of gas to local consumers, and the service rendered to them was 'essentially local,' being similar to that of a local plant furnishing

tion, the Court had applied the "non-local" label with the consequence of ousting the state regulation.

The Attleboro Company was apparently the only interstate customer,⁶⁷ although the finding of the Rhode Island Commission is a bit ambiguous as to how far the others were affected by its enjoyment of the pre-war figures. Mr. Justice Brandeis made this the point of his dissent:

"The problem is essentially local . . . The Commission found as a fact that continuance of the service to the Attleboro Company at the existing rate would prevent the Narragansett from performing its full duty towards its other customers and would be detrimental to the general public welfare. It issued the order specifically to prevent unjust discrimination and to prevent unjust increase in the price to other customers. The Narragansett, a public service corporation of Rhode Island, is subject to regulation by that State. The order complained of is clearly valid as an exercise of the police power, unless it violates the Commerce Clause."⁶⁸

And he found no violation.

It will be recalled that when federal authority considers that a state commission order causes burdening of interstate interests, the federal authority upsets the order. The instant decision shows that a state lacks power to protect local business, which may suffer losses on the interstate part of an intrastate and interstate business. Protection in ratemaking is here denied. Presumably protection by authorizing the discontinuance of the interstate part would also be denied to the state authority, although the Interstate Commerce Commission has protected the interstate

gas to consumers in a city; and that such 'local service' was not of the character which required general and uniform regulation of rates by congressional action, even if the local rates might 'affect' the interstate business of the company.

"In the Kansas Gas Co. Case the company, whose business was principally interstate, transported natural gas by continuous pipe lines from wells in Oklahoma and Kansas into Missouri, and there sold and delivered it to distributing companies, which then sold and delivered it to local customers." It held "that the rate which the Company charged for the gas sold to the distributing companies . . . was not subject to regulation by the Public Utilities Commission of Missouri."

⁶⁷ Note 2 in the opinion does not make this absolutely clear.

⁶⁸ *Supra* note 63, at 91, 47 Sup. Ct. at 297.

portion by ordering the discontinuance of the intrastate part of a railroad.⁶⁹

The result is for the present unfortunate, for, the accidents of its geography aside, the situation is readily adjustable under accepted principles. By geographical accident neither state under the decision has the authority to make the adjustment; and as the federal government has set up, as yet, no machinery to do anything, nothing at all is done. The result, however, is a direct invitation to the entry of the federal authority, and in that aspect shows a silver lining. If the much-talked-of Superpower Project, hooking up hydro-electric power and power from coal burned at the mine, comes to reality, the *Attleboro* case furnishes a welcome starting point for its only effective scheme of regulation—namely by federal authority—whether by the agency of the Interstate Commerce Commission or the Federal Power Commission⁷⁰ is not immediately material.

PAYMENT IN MONEY

The non-discrimination theory as embodied in the filed rate not only requires that the rate as filed shall be adhered to as a common denominator, but also that the payment be in money.⁷¹

⁶⁹ The Narragansett Company is left no authority to which to appeal for permission to discontinue this unprofitable service to out-of-the-state customers, even if there were no contract. The federal cases zealously guard the interstate business of the carrier from being saddled with non-paying intrastate matters. See *Colorado v. U. S.*, 271 U. S. 153, 46 Sup. Ct. 452 (1926), discussed by the writer in *The Interacting Areas of Regulatory Authority in Public Utilities* (1928) 76 U. OF PA. L. REV. 394, 401. What the state may do to relieve local utilities when interstate feeds unduly upon intrastate business, has received no attention. Is the answer to be, "Nothing"?

⁷⁰ The case was noted in (1927) 27 COL. L. REV. 615; Note (1927) 15 GEO. L. REV. 346; (1927) 40 HARV. L. REV. 906; (1928) 22 ILL. L. REV. 197; (1927) 36 YALE L. J. 881. It is discussed as part of the state-federal problem in the writer's article, *supra* note 69, at 417.

⁷¹ *Pittsburgh, Cincinnati, Chicago & St. L. Ry. v. Fink*, 250 U. S. 577, 581, 40 Sup. Ct. 27 (1919), required the consignee to pay a filed rate, although by the carrier's own mistake a lower rate had been collected. "The purpose of the Act . . . was to provide one rate . . . and to make the only legal charge . . . the rate duly filed . . ." *Louisville & N. R. R. v. Mottley*, *supra* note 55, at 476, 31 Sup. Ct. at 268, refusing validity to a contract to receive current transportation in return for a past release of a claim on the carrier, said: "And it cannot be doubted that the rates . . . specified in such schedule were payable only in money." So also, as to a plan for transportation bartered against professional services to railroad employees, by a physician, see *State v.*

Variations in the purchasing power of the latter result in the curious example of mechanical jurisprudence of *Washburn-Crosby Co. v. Northern Pacific Ry.*,⁷² where the carrier sued the shipper for a balance claimed to be due on grain, sent from points in Canada to Minneapolis, which moved under joint tariffs, duly filed by the Canadian and American roads. The rates were recited in dollars; and at filing, dollars Canadian and dollars American were of interchangeable value. At the time of shipment, however, the Canadian dollar had relatively fallen off. The Canadian carriers, therefore, refused pre-payment⁷³ on freight bound for the States, while our roads required pre-payment on hauls into Canada, in order, by thus "catching them going and coming," always to collect the more valuable United States dollars.

Having, under protest, paid for the whole haul in United States dollars, the Crosby Company⁷⁴ brought suit on the theory that, as it was bound to pay for the Canadian haul only Canadian dollars, or their equivalent in United States money, it had been charged too much. In the District Court it recovered a judgment which it lost in the Circuit Court of Appeals, where, for the court, Stone, Cir. J., said:

"When these joint rates . . . were filed . . . both carriers intended to specify the same value for the service

Martyn, 82 Neb. 225, 117 N. W. 719 (1908). By special exempting provisions in the amendment of June 18, 1910, 36 STAT. 544 (1910), by which telegraph and telephone and cable companies were swept into the jurisdiction of the Interstate Commerce Commission, they were allowed to exchange services with common carriers.

⁷² 16 F. (2d) 76 (C. C. A. 8th, 1926).

⁷³ The court explains that the refusal and the demand were authorized by the respective laws.

⁷⁴ Three cases were adverted to in which the same question had come up, but which had gone off against the plaintiffs because the American dollars had been paid for the whole haul without protest. If, however, the topic is a problem in the filed rate theory, which it seems clearly to be, it is hard to see why protest or no protest has any bearing. If the carrier's mistakes of quotation and collection, etc., do not prejudice the availability to him of the filed rate, then it is not clear why the shipper's error should prejudice its availability to him. The three cases are *New York & Pa. Co. v. Davis*, 2 F. (2d) 858 (E. D. Pa. 1924), *aff'd*, 9 F. (2d) 911 (C. C. A. 3d, 1926); *New York & Pa. Co. v. Davis*, 8 F. (2d) 662 (W. D. N. Y. 1925); and *Mountain Lumber Co. v. Davis*, 9 F. (2d) 478 (S. D. N. Y. 1925), *aff'd*, 11 F. (2d) 219 (C. C. A. 2d, 1926).

and the result was as intended. Both the (Canadian) Board and the (Interstate Commerce) Commission understood this intention and this result. This intention and result was understood by the public . . . There was no thought that the charge . . . should fluctuate with changes in value between the currencies of the two countries and even upon the same shipment, be different according to the country in which the charge might be paid. No such uncertainty would have been tolerated, either by the Board or by the Commission."

The opinion went on to develop the requirement for certainty, to the conclusion that:

"As the carriers are bound by the tariffs filed and cannot depart therefrom, the only practical way in which this confusion and discrimination could be avoided was to require all charges to be paid either in Canada or in the United States. To require payment in Canada, would discriminate against the Canadian carriers and, because the American carriers are entitled to and are required to demand payment of their part of the charge in United States money (*Abrasive Co. v. Director General*, 69 *Interst. Com. Com'n R.* 630), would result in the Canadian carriers receiving less than their real portion of the divisional charge. If the shipper has the choice of place of payment, the same result would follow, as Canada would be chosen by him. If the payment were made in the United States, the shipper would pay only the tariff rate although the charge would be higher than if paid in Canadian money and there would be no confusion or discrimination between shippers or carriers and no disturbance of Canadian tariff situations."⁷⁵

⁷⁵*Supra* note 72, at 77, 78. Judge Symes dissented. He found nothing in the Canadian law which gave the Canadian roads more than the money, in Canadian dollars, which the Canadian tariffs provided; and the practical difficulties arising out of the dislocation of the rate structure which turned the case with the majority were, he considered, the concern of the Interstate Commerce Commission, and not of the court.

The fluctuation of value between the currencies was considerable; "8 to 17 per cent," remarks the court. It meant that a considerable excess was collected and, under the decision, retained; and its disposal is of interest. On this point the court says, at 76, that: "The charges in accordance with these joint through rates were divided between the Canadian and American carriers on a percentage basis which was the result of agreement between them and did not depend entirely on the respective length of hauls in the two countries." If this means that not only did the Canadian roads get the equivalent of more Canadian

Its effect is offset, however, by the recent decision in *News Syndicate Co. v. New York Cent. R. R.*⁷⁶ In this case the newspaper for New York City moved from Thorold, Ontario, some thirty miles over the Canadian National Railways, to a point in New York, where the New York Central took over the shipments. The Canadian and United States carriers joined in publishing a through rate: "No rates were made or published for the transportation from the international boundary to New York City."⁷⁷ Alleging that these through rates were too high, the shippers applied to the United States Interstate Commerce Commission for a revision and reparation, both of which the Commission granted, and it was on the order for reparation from the United States carrier that suit was brought. A demurrer, based on the theory that the order was "void for want of jurisdiction because it dealt solely with charges for transportation from a point in Canada to a point in the United States" was sustained at trial and the Circuit Court of Appeals of the Seventh Circuit certified to the United States Supreme Court the following questions:

"(1) (under the facts) has the . . . Commission . . . jurisdiction, on complaint . . . against the United States railroad alone, to determine the reasonableness of such joint through rates?

"(2) . . . has the . . . Commission, (on finding it unreasonable) but in the absence of a finding that the charges (for the intra-United States haul) were . . . un-

dollars than the Canadian tariffs allowed them, but also that the American roads get more American dollars than the American tariffs called for, the case is still less understandable.

The note in (1927) 40 HARV. L. REV. 907, points out that the United States Interstate Commerce Commission has no jurisdiction to fix a joint rate for such a transit as the one here involved, but that a joint rate set by the Canadian Board of Railway Commissioners might be accepted by our Commission as reasonable. It considers that the court has, in effect, usurped the Canadian Board's powers and raised the Canadian rates from the origin point to the border.

See also (1927) 11 MINN. L. REV. 462; (1927) 36 YALE L. J. 1027. The Yale note shows that Canada has a rule corresponding to our own, that the filed rate in Canadian dollars shall govern. U. S. Surcharge Case, 27 Can. Ry. Cas. 90, 104 (1921).

⁷⁶ 275 U. S. 179, 48 Sup. Ct. 39 (1927).

⁷⁷ *Ibid.* 185, 48 Sup. Ct. at 40.

reasonable, jurisdiction to make . . . (a reparation order based on the variances in the through rates)?

"(3) . . . can a suit (on the order) be maintained solely against the United States carrier?" ⁷⁸

By Mr. Justice Butler, the unanimous Court answered "Yes" to each question:

"The *Interstate Commerce Act* applies to the lines that carried, and to the transportation of, the paper from the international boundary to New York City. It was the duty of defendants in error to establish just and reasonable rates for that service. Section 1 (5); Section 6 (1) and (7). They failed to make or publish any rate applicable to that part of the transportation. Section 8 makes them liable for damages sustained in consequences of such failure. Had the through rate been just and reasonable, no damages would have resulted to plaintiff in error. Its right to reparation does not depend upon the amounts retained by defendants in error pursuant to agreed divisions. *Louisville and Nashville R. Co. v. Sloss-Sheffield Co.*, 269 U. S. 217, 231. . . . Their breach of the statutory duty was a proximate cause of the losses complained of. The failure to establish rates covering the transportation from the international boundary contravened the provisions of the act and compelled plaintiff in error to pay the through charges complained of. The Commission had jurisdiction to determine whether plaintiff in error was entitled to an award of damages under the provisions of this act for a violation thereof." ⁷⁹

⁷⁸ *Supra* note 76, at 184, 185, 48 Sup. Ct. at 39, 40. "The Commission did not determine," says the Court, "what would be just and reasonable rates for this transportation within the United States."

⁷⁹ *Supra* note 76, at 186, 48 Sup. Ct. at 40. He continued: "The Commission did not specifically find whether the portions of the charges fairly attributable to transportation within the United States were excessive to the extent that the through rates were found unreasonable. While the findings seem to indicate that the Commission held the entire excess should be charged against the American lines, we shall consider the question on the basis therein stated. The Canadian lines furnishing the transportation from Thorold to the international boundary were not before the Commission and were not sued. The defendants in error participated in the making of the through rate and actually collected the excessive charges. By their failure to comply with the Act, plaintiff in error was compelled to pay charges based on the through rates. On the facts stated, the Commission was authorized to hear the complaint, § 13 (1); and had jurisdiction to make the order, § 16 (1)."

ERRORS BY THE CARRIER AND THE FILED RATE POLICY

A. Mistake in Filing the Rate

The rate as filed was a clerical mistake in a recent case, which nevertheless holds that the shipper, at least, may insist upon the benefit of it. In *Magnolia Provision Co. v. Beaumont*,⁸⁰ the carriers charged only 23 cents, the figures on file, but a 70-cent figure had been and was meant to be the filed rate, and after the error was observed, it became again the filed rate. The shipments occurred while item No. 3405 in the filed tariff named a rate of 23 cents. Denying recovery of the difference to the carriers, the court said:

"The carriers concede that *prima facie* the 23-cent rate is applicable, but they show both by the structure of the tariff and by the evidence of F. A. Leland, who compiled the tariff and caused it to be published, that the 23-cent rate was never intended to be set out in item No. 3405, but just below in No. 3410, and that by the printer's or a clerk's error this 23-cent rate was put in the No. 3405 bracket and there left improperly.

"I agree with the carriers that the evidence . . . shows plainly that the 23-cent rate was not originally drafted for the bracket 3405; but I agree with plaintiffs that the question of what the carriers intended abstractly is wholly immaterial, and that none of this evidence is relevant to the issue . . . because in law it is an irrebuttable presumption that a rate filed with the Commission and published is the lawful rate, and the carrier cannot be heard to dispute the rate by such claim."⁸¹

In most of the decisions the blunder of the carrier is the erroneous statement of a rate which was actually filed as intended to be filed. The customer pays the filed rate regardless

⁸⁰ 20 F. (2d) 384 (S. D. Tex. 1927).

⁸¹ *Ibid.* 385. "The decisions of the Interstate Commerce Commission," the court added, "on this point are uniform, and, while no direct opinion of the Supreme Court determining the matter has been called to my attention, the Supreme Court, in *Davis v. Portland Seed Company*, 264 U. S. 403 . . . approves the Commission's ruling on this point, saying: 'The Commission holds, for example, that, although the schedule contains a plain clerical error, nevertheless no other charge may be demanded, and the shipper may recover any excess.'"

of the blunder, and the carrier is no worse off thereby.⁸² The principal case, however, charges upon the carrier himself the blunders in filing rates at variance with his intention. If the variance be wide enough, a result is capable of a *reductio ad absurdum*. In a simple contract it may be so large that the acceptor is not aided by the law in claiming contractual rights, and his insistence is labelled bad faith. Devotion to the filed rate mechanism should not blind to the public interest in the utility's welfare. It is entitled to a reasonable rate, and the shipper frequently has enough familiarity with conditions to know something about its figures from past experience. That interest should protect the utility from its own blunders, if they are so costly as to imperil its service powers. The instant case itself might be covered by empowering the commissions to make reparation orders in favor of the utility to the extent of the deficiency below the reasonable rate.

Yet the Circuit Court of Appeals affirmed the holding.⁸³ It cited the familiar cases and added:

"In *Lamb-Fish Lumber Co. v. Y. & M. V. R. R. Co.*, 42 I. C. C. 470, the Interstate Commerce Commission announces the rule that proof of error in the publication of rates does not justify a departure from the published rates, even though shippers have full knowledge that the rates were published by mistake, and that decision was cited with approval by the Supreme Court in *Davis v. Portland Seed Co.*, 264 U. S. 403, 424. . . . The carriers cannot defend by showing that published rates, if enforced, would violate the long and short haul clause and subject them to penalties. Such a showing would only be evidence of intention indicating that a mistake was made. Because of the policy of the law, the rate must be abided by as long as it is included in published schedules of rates. The remedy of the carriers is to apply to the Interstate Commerce Commission to have the rate changed."⁸⁴

⁸² *Pittsburgh, etc., Ry. v. Fink*, 250 U. S. 577, 40 Sup. Ct. 27 (1919); *Penn. R. R. v. Titus*, 216 N. Y. 17, 109 N. E. 857 (1915). There are notes on the topic in (1918) 18 *COL. L. REV.* 272; (1915) 28 *HARV. L. REV.* 516; (1920) 15 *ILL. L. REV.* 102; (1922) 32 *YALE L. J.* 734.

⁸³ 26 F. (2d) 72 (C. C. A. 5th, 1928).

⁸⁴ *Ibid.* 73.

On October 15, 1928, the Supreme Court of the United States refused certiorari.^{84a}

B. Mistake in Quoting a Rate Filed

That the rate filed for the service performed must be collected, has become firmly established where the service actually rendered is the one asked by the customer, and the suit arises out of the carrier's mis-quotation of the rate on file for it. The cases are well known.⁸⁵ Their philosophy is that: "It is apparent that . . . (by mistakes real or simulated) a wide door would be thrown open for an evasion . . ." ⁸⁶ They have furnished the typical mechanical applications of the general doctrine that the filed rate means to achieve certainty at the expense of principles which, in other branches of the law, leave one upon whose actions others rely to bear the reasonable costs of his own errors.

Another line of cases deals with mistake as to the service given, itself. If the service asked in Boston is transportation to New York, and that mistakenly given is transportation to Chicago, the carrier obviously may not collect for the service rendered. The cases are not so simple as that. They are instances where service to Chicago is asked and performed and, though it could have been done over a cheaper route, it was actually carried out over a more costly one. In these cases the duty on the carrier to use the cheaper route ⁸⁷ has been held to bar recovery for the service actually performed.⁸⁸ *Swift & Co. v. New York Cent. R. R.*,⁸⁹ might be regarded as a case of mis-routing

^{84a} U. S. Daily, Oct. 16, 1928, at 2026.

⁸⁵ The decisions most cited are Interstate Commerce cases involving railroads, but the state courts are in accord. A recent case is *Kansas Electric P. Co. v. Thomas*, 123 Kan. 321, 255 Pac. 33 (1927), where the utility's suit was opposed unsuccessfully by proof that the consumer had paid all bills as rendered and knew nothing of the mistakes in them. The court stated at 325, 255 Pac. at 35, that the cases under the Interstate Commerce Act were its guide. "To permit an estoppel . . . would permit favoritism and discrimination. . . . The lawful rate must be collected."

⁸⁶ *Louisville & N. R. R. v. McMullan*, 5 Ala. App. 662, 667, 59 So. 683, 684 (1912).

⁸⁷ *Northern Pacific Ry. v. Solum*, 247 U. S. 477, 38 Sup. Ct. 550 (1918).

⁸⁸ *Galveston, H. & S. A. Ry. v. Lykes Bros.*, 294 Fed. 968 (S. D. Tex. 1923).

⁸⁹ 16 F. (2d) 17 (C. C. A. 2d, 1926).

in so far as it condemned the circuitous route. The aggregate of the two local rates for the long haul was declared not to be the charge, although whether that was the haul actually made is not clear.

In *St. Louis S. F. Ry. v. Republic Box Co.*,⁹⁰ if the shipper's directions had been followed the money collected at the destination would have been sufficient. But the railroad so routed the shipment that the filed rate applicable to the movement was more, and the last carrier sued for the balance. The defendant opposed recovery on the ground that ". . . when it placed the shipment . . . it gave instructions concerning both route and rate. . . . Plaintiff insists upon the general principle that the legal tariff applicable between the points of travel is the only legal rate" ⁹¹ In denying recovery the court said:

" . . . that, there having been two routes over which the shipment could have moved, and the shipper having designated the route and the rate, the carrier was just as responsible for the loss to the shipper, and just as little entitled to recover the full legal rate from it, as he was held to have been ⁹² . . . and this not only because of the Interstate Commerce Commission ruling invoked, but because of the principles announced in the cases referred to." ⁹³

WHO IS LIABLE FOR THE PAYMENT OF THE FILED RATE?

The *Republic Box* case furnishes also a text for discussion as to which of the various persons involved is to pay the filed rate. The carrier may insist upon its payment before he receives or before he parts with the goods, or he may subsequently collect it from the person liable to pay it. Business instincts join with the non-discrimination policy in insisting that it be collected from some one. Who that person is has furnished some neat

⁹⁰ 12 F. (2d) 441 (S. D. Tex. 1926).

⁹¹ *Ibid.* 442.

⁹² The court here cites *Galveston, H. & S. A. Ry. v. Lykes Bros.*, *supra* note 88; *Louisville & N. R. R. v. Maxwell*, 237 U. S. 94, 35 Sup. Ct. 494 (1915); and *St. Louis S. W. Ry. v. Spring River Stone Co.*, 236 U. S. 718, 35 Sup. Ct. 456 (1915).

⁹³ *Supra* note 90, at 443.

questions. The *Republic Box* case concerned the shipper's liability to pay a balance, on part of a haul, after the consignee already, on getting the goods, had paid the rate demanded. The bill of lading read that "the owner or consignee shall pay the freight," and the defendant argued that the carrier had elected to accept the "consignee's" liability. On this point the court said that the:

"... rule is briefly that a shipper, who does not own the freight, may at the time of shipment protect himself against liability by providing that the consignee or the owner must pay the freight. As said in *L. & N. R. R. v. Central Iron Co.*, 265 U. S. 59 . . . 'Under the rule of the *Fink Case* (250 U. S. 577 . . .), if a shipment is accepted, the consignee becomes liable, as a matter of law, for the full amount of the freight charges, whether they are demanded at the time of the delivery, or not until later. *His liability satisfies the requirements of the Interstate Commerce Act* (Comp. St. § 8563 et seq.)' . . .

"This being the law, if the facts in any case warrant the court in finding that the railroad company has looked to the consignee, and not the shipper, it is competent for the court to hold that the facts establish either that the shipper is not liable at all, or is liable only secondarily and upon a showing by adequate proof that all proper steps have been taken in vain against the consignee."⁹⁴

Thus the shipper or consignor may drop out of the transaction, although in *Louisville & N. R. R. v. Central Iron & Coal Co.*⁹⁵ Brandeis, J., speaking for the Court, said:

"Ordinarily, the person from whom the goods are received for shipment assumes the obligation to pay the freight charges; and his obligation is ordinarily a primary one. This is true even where the bill of lading contains, as here, a provision imposing liability upon the consignee. For the shipper is presumably the consignor; the transportation ordered by him is presumably on his own behalf; and a promise by

⁹⁴ *Supra* note 90, at 442.

⁹⁵ 265 U. S. 59, 44 Sup. Ct. 441 (1924).

him to pay therefor is inferred (that is, implied in fact) as a promise to pay for goods is implied, when one orders them from a dealer. But this inference may be rebutted, as in the case of other contracts. It may be shown, by the bill of lading or otherwise, that the shipper of the goods was not acting on his own behalf; that this fact was known by the carrier; that the parties intended not only that the consignee should assume an obligation to pay the freight charges, but that the shipper should not assume any liability whatsoever therefor; or that he should assume only a secondary liability."⁹⁶

In this case, the Central Coal & Iron Company,⁹⁷ sold coke to Tutwiler & Brooks, deliverable f. o. b. cars at the Coal & Iron Works, and the immediate buyers resold to an ultimate buyer in Arizona. The Central Company then became shipper in the sense that it started the transit, but the bill of lading was taken to the order of Tutwiler & Brooks, and was by them indorsed over to the Arizona people, who received the goods on payment of the \$5000 freight charge demanded. Three years later the carrier found that under the tariff it should have charged \$8500. Acting on the principles above, the Court let the Central Coal & Iron Company out, and was left to interpret a bill of lading which read "consigned to Order Of Tutwiler and Brooks . . . Destination Mayer, Arizona . . . Notify Great Western Smelters Corporation . . . owner or consignee shall pay the freight."⁹⁸

⁹⁶ *Ibid.* 67, 44 Sup. Ct. at 443.

⁹⁷ Mr. Justice Brandeis says, in note 3 of that case: "See Interstate Commerce Commission Conference Ruling No. 314, Bulletin No. 7, issued August 1, 1917: 'The law requires the carrier to collect and the party legally responsible to pay the lawfully established rates without deviation therefrom. It follows that it is the duty of carriers to exhaust their legal remedies in order to collect undercharges from the party or parties legally responsible therefor. It is not for the Commission, however, to determine in any case which party, consignor or consignee, is legally liable for the undercharge, that being a question determinable only by a court having jurisdiction and upon the facts of each case.' This ruling, which was adopted May 1, 1911, and 'interpreted' May 4, 1918, was amended, on March 6, 1922, by calling attention to the provision inserted in the Uniform Domestic Bill of Lading prescribed October 21, 1921. By that provision the consignor may (see Section 7 of Conditions and clause on face of bill) relieve himself of all liability for freight charges. *In the Matter of Bills of Lading*, 52 I. C. C. 671, 721; 64 I. C. C. 347; *ibid.* 357; 66 I. C. C. 63."

⁹⁸ *Supra* note 95, at 64, 44 Sup. Ct. at 442.

The Great Western had become insolvent. The discussion makes it pretty clear that the Court considered Tutwiler & Brooks to be the consignee, for it invites the road to look to them, remarking that: "There was no suggestion that (they) were insolvent."⁹⁹ If *they* had been, rather than the "notify" party who actually received the goods, what then?

In the very case the "notify" party received the goods in Arizona as endorsee and holder of the bill—as owner—so that in the event that Tutwiler & Brooks were not "good" and the westerners were, suit would lie against the latter. This was held in a recent case, *Central Warehouse Co. v. Chicago R. I. & P. Ry.*,¹⁰⁰ in which, summarizing the various decisions working out the policy of the *Elkins Act*, and of section 6 of the *Commerce Act*,¹⁰¹ the court said:

"The Central Warehouse Company was not the consignee of the goods, but the bill of lading was indorsed to it. Its title to the property was the same as that of the consignee. Whatever obligations were imposed upon the original party to the contract of carriages was necessarily assumed by the plaintiff in error when it accepted the bill of lading and demanded the possession of the car of sugar."¹⁰²

In that very case the court made a brutal application of the filed rate policy, for the bill of lading which the Central Company bought had been marked "prepaid" by the initial carrier, and everybody at the destination relied on this recital at the time of the delivery to the Central Company. Moreover, the shipper was insolvent and unable to repay the Central Company, which had already remitted to him the proceeds of the shipment less charges.¹⁰³

⁹⁹ *Supra* note 95, at 65, 44 Sup. Ct. at 442.

¹⁰⁰ 20 F. (2d) 828 (C. C. A. 8th, 1927).

¹⁰¹ *Great Northern Ry. v. Hyder*, 279 Fed. 783 (S. D. Wash. 1922); *Western & Atlantic R. R. v. Underwood*, 281 Fed. 891 (N. D. Ga. 1922); *Davis v. Akron Co.*, 296 Fed. 675 (C. C. A. 6th, 1924); *Cincinnati Northern Ry. v. Beveridge*, 8 F. (2d) 372 (E. D. Va. 1925). For the *Elkins Act* see *supra* note 15. For § 6 of the Interstate Commerce Act, and its numerous amendments, see *supra* note 8, and 49 U. S. C. § 6 (1926).

¹⁰² *Supra* note 100, at 829.

¹⁰³ The Central Warehouse Co. was a commission house. It disposed of the goods for account of the shipper and remitted, less deductions. But the com-

In *Dare v. New York Cent. R. R.*,¹⁰⁴ the Circuit Court of Appeals for the Second Circuit played another variation on the perils of one who loans money on a bill of lading as security. The bill in question was for the railroad haul from Illinois to New York City, on bills of lading running to various consignees in New York City, whose commission house was the Brainard Commission Company. "The bills . . . were indorsed in blank by the consignees and were pledged to the defendants (the Dares) as security for money loaned by them to the Brainard Commission Company. The defendants then delivered them to the plaintiff railroad, with instructions to deliver the oats 'for our account' to named vessels for export (on terms of) 'freight and all charges collect from Brainard Commission Company.' The plaintiff made delivery to the vessels as ordered, and presented freight bills to the Brainard Commission Company. Finding it insolvent and unable to pay, the plaintiff demanded payment from the defendants,"¹⁰⁵ who meantime had released the new shipping documents to the Brainard Commission Company upon payment of the loan. The plaintiff had no knowledge of the relations between the Dares and the Brainards; and neither the plaintiff nor the defendants knew that the latter were insolvent.

To the argument that the *Fink*, the *Central Coal & Iron Co.*, and the *York & Whitney* cases¹⁰⁶ were inapplicable, because the Dares were only pledgees for security, the court replied that the fact was "immaterial."¹⁰⁷ It will be noted that the question is not as to the ocean freight bill, which the railroad had paid to the

mission houses had definitely lost the fight in *New York Central R. R. v. York & Whitney Co.*, 256 U. S. 406, 41 Sup. Ct. 509 (1921), where although the commission house did just as it did in the instant case, the Supreme Court said, at 408, 41 Sup. Ct. at 510, that "the transaction . . . amounted to an assumption . . . to pay the only lawful rate."

¹⁰⁴ 20 F. (2d) 379 (C. C. A. 2d, 1927).

¹⁰⁵ *Ibid.* 380.

¹⁰⁶ *Pittsburgh, etc., Ry. v. Fink*, *supra* note 82; *Louisville & N. R. R. v. Central Iron & Coal Co.*, *supra* note 95; *New York Central R. R. v. York & Whitney Co.*, *supra* note 103.

¹⁰⁷ The result is approved in (1928) 28 COL. L. REV. 96, which says that in view of the number of indorsements which may appear on a bill of lading, it seems fair to make the indorsee who secures the delivery liable, although the American Bill of Lading Act, unlike that of England, does not make mere endorsement a transfer of liability as well as of rights.

steamer. The Dares undoubtedly owe the New York Central for that. The decision is that a banker who advances money to a commission house on a collection of blank bills becomes liable for the freight charges unless he takes the precautions which the court indicates. The gist of the case seems to be: "So far as the plaintiff knew the defendants were owners of the shipments. They held order bills of lading duly endorsed . . . We see no reason why the holder should not stand in the shoes of the consignee in respect to the obligation to pay freight upon delivery to him. At least this should be true where the carrier does not know that the holder of the indorsed bill is not the owner."¹⁰⁸

Purchasers or receivers of transported goods who take them directly from the carrier's hands should tread warily.¹⁰⁹ The pursuit of the ultimate payer has been so far overdone that Congress has allowed in its field a measure of self protection for agents. A recent amendment to paragraph 2 of section 3 of the *Interstate Commerce Act* adds:

"Where carriers are instructed by a shipper or consignor to deliver property . . . to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges . . . which may be found

¹⁰⁸ *Supra* note 104, at 380. A note in (1927) 27 COL. L. REV. 89 discusses the Central Warehouse case; and the whole topic of who is liable for the charges is covered by a note in (1925) 23 MICH. L. REV. 657 to Nashville, C. & St. L. Ry. v. Gilliam, 212 Ala. 120, 101 So. 889 (1924).

A consignee who had received lumber which he had ordered from a house in St. Louis and who was prepared for a bill for freight from St. Louis was startled later to receive a bill for a sum, seven times greater, covering charges which had piled up from the origin point far beyond the Missouri city. The Ohio court mercifully refused to let the railroad collect the bill from the consignee. *Cleveland C. C. & St. L. Ry. v. McKenzie Lumber Co.*, 112 Ohio St. 80, 147 N. E. 8 (1925); (1925) 20 ILL. L. REV. 372.

¹⁰⁹ In a recent New York decision, *Erie R. R. v. Rosenstein*, 222 App. Div. 509, 510, 227 N. Y. Supp. 99, 100 (1928), the commission merchant, who in the very case was not known to the carrier to be such, "accepted . . . merchandise shipped under a straight bill of lading, naming the consignor as consignee." There was the usual carrier's error as to the amount due. Despite the argument that he "is neither the owner, nor the consignor, nor the consignee named in the bill," the court held the commission man liable for the tariff rate, adopting, as to an attempted distinction between a straight and an order bill, the language of a former decision that, "The difference . . . lies in the duty which rests upon the railroad. . . . The rule as to freight charges, however, remains the same in both cases." *Ibid.* Citing the Dare case, *supra* note 104, on the liability of one to whom delivery is made, it said: "That Dare held an endorsed bill of lading is (merely) a factual difference." *Ibid.* 511, 227 N. Y. Supp. at 101.

to be due after the property has been delivered to him (a) if the consignee is an agent only and has no beneficial title . . . and (b) prior to delivery . . . has (so) notified the delivering carrier in writing."¹¹⁰

EXCUSES FOR NON-PAYMENT OF THE FILED RATE

A. "Act of God" or "Vis Major"

The sacrifices upon the altar of ready administration which arise out of the application of the filed rate doctrine to the subject of demurrage may be briefly considered. The debates arise on whether the amount filed is collectible, not only when the delays can be ascribed to the acts or defaults of the deliverer of the cars, but also when they are due to the acts of others, or to circumstances humanly unwilling and uncontrolled. "Wrongful acts," "act of God," "*vis major*," and like phrases come to mind by way of description of the instances. In *Southern Ry. v. White*,¹¹¹ the railway's suit was resisted on the ground that after the cars had been placed on the defendant's logging track a wash-out of a bridge prevented their prompt return. The court considered the obligation to return or pay a duty imposed by law, and applied, in the defendant's favor, the doctrine of "impossibility" by "act of God."

¹¹⁰ 44 STAT. 1447 (1927). On the general topic of who must pay, it provides:

"(2) No carrier by railroad subject to the provisions of this Act shall deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon have been paid, except under such rules and regulations as the commission may from time to time prescribe to govern the settlement of all such rates and charges and to prevent unjust discrimination. Where carriers by railroad are instructed by a shipper or consignor to deliver property transported by such carriers to a consignee other than the shipper or consignor, such consignee shall not be legally liable for transportation charges in respect of the transportation of such property (beyond those billed against him at the time of delivery for which he is otherwise liable) which may be found to be due after the property has been delivered to him, if the consignee (a) is an agent only and has no beneficial title in the property, and (b) prior to delivery of the property has notified the delivering carrier in writing of the fact of such agency and absence of beneficial title, and, in the case of a shipment reconsigned or diverted to a point other than that specified in the original bill of lading, has also notified the delivering carrier in writing of the name and address of the beneficial owner of the property. In such cases the shipper or consignor, or, in the case of a shipment so reconsigned or diverted, the beneficial owner, shall be liable for such additional charges, irrespective of any provisions to the contrary in the bill of lading or in the contract under which the shipment was made."

¹¹¹ 284 Fed. 560 (C. C. A. 6th, 1922).

A prior federal case, however, denied him the refuge of "impossibility" by "act of man," where the violence of strikers in the consignee's plant caused the local authorities to shut up his shop until the arrival of militia. In *Sinclair Refining Co. v. Schaff, Receiver of M. K. T. Ry.*,¹¹² the Circuit Court of Appeals for the Eighth Circuit said:

"In view of the prohibitions of the statute, it is clear that courts are equally (with the Commerce Commission) without power to release parties from obligation of tariffs providing for demurrage charges on the ground that such charges have been occasioned by a strike. Congress alone has the power to write such an exception into the statute."

On the other hand the West Virginia court was able to relieve the defendant of the duty to pay for the delay in *Chesapeake & Ohio R. R. v. P. T. Board*.¹¹³ The court "distinguished" the *Sinclair Refining* case on the ground that, as there the strike was one among the defendant's own employees, it was "within the power of the employer to prevent or stop the strike by coming to terms with his employees." In the case before it:

"At the time the cars were placed at Hansford and during the entire time for which the demurrage was charged men in the number of many hundreds, perhaps thousands, engaged in what became commonly known as the 'Armed March' on Logan County. During the continuance of this march, armed participants therein patrolled and were in complete charge of the public highways and railroad tracks in the vicinity of Hansford. . . . Civil authority failed, and the uprising continued until it was quelled by United States troops" ¹¹⁴

It declared that the railroad's suit for \$365 claimed under the published tariffs failed, and held that where the law creates the duty, the law provides an exception under the doctrines developed in *Paradine v. Jane*,¹¹⁵ and more recent cases, which are set forth. The "armed march" was a *vis major*, and "it (the

¹¹² 275 Fed. 769, 774 (C. C. A. 8th, 1921).

¹¹³ 100 W. Va. 222, 224, 130 S. E. 524, 525 (1925).

¹¹⁴ *Ibid.* 223, 130 S. E. at 524.

¹¹⁵ Aleyn 27, 82 Eng. Repr. 897 (1681).

demurrage charge) was designed to prod the slothful shipper and not to oppress one who is unable to perform by reason of a vis major."

The question of who is to pay the filed rate has evoked decisions as to demurrage also. The efficiency plan of a number of carload coal receivers furnishes *Emmons Coal Mining Co. v. Norfolk & Western Ry.*¹¹⁶ There a so-called "pooling exchange" was organized at the Lambert's Point yard at tide-water, whereby the incoming coal was graded before it entered the limits, and the participants in the pool agreed that, without going through the labor and expense of sorting out cars, each member's orders should be filled out of conveniently reachable cars of equal grade. Cars consigned to the Emmons Company, having been unloaded to satisfy orders of another, whose cars were in turn reserved in equal quantity for the Emmons Company and later used by them, the question was who should pay the demurrage on the reserved cars. The Court answered that the Emmons Company should do so.

A more recent case of the same general sort involved an efficiency program whereby various mines during a car shortage:

"... adopted a practice by which the cars, as soon as loaded, were shipped from the mines to Russell without formal billing, but only on cards or tickets. There they were weighed, the railroad company was supplied with the name of the consignee, and they were shipped out on a B/L as if directly from the mines to destination. At this time the general demurrage rules required demurrage to be paid upon any cars held by or for shippers beyond the minimum limit, but the car distribution rules provided that, if the mine did not use all of its quota delivered to it on one day, the remainder should be charged against its quota for the next day, and the general demurrage rule was displaced at the mines by this distribution rule."¹¹⁷

Later the demand for coal fell off so that cars were delayed at Russell, Ky., and the carrier, in *Main Island Creek Coal Co.*

¹¹⁶ 272 U. S. 709, 47 Sup. Ct. 254 (1927).

¹¹⁷ *Main Island Creek Coal Co. v. Chesapeake & O. Ry.*, 23 F. (2d) 248, 249 (C. C. A. 6th, 1928).

v. Chesapeake & Ohio R. R.,¹¹⁸ sued to recover demurrage. Two points are of interest. One concerned the tariff clause which excepted from demurrage "cars under load with coal at such mines, mine sidings, etc.," and the coal company's claim that "these Russell yard tracks (perhaps one hundred miles away) by usage had become mine sidings."¹¹⁹ Conceding this as to the emergency period, the court denied it on the present facts, and ruled that demurrage was due. Since the object of the exception plainly was that the shipper who had done his part should not pay the carrier for the latter's own delay in getting the cars away, the ruling seems unimpeachable. The court said that the emergency measures "contemplated no storage of cars at Russell and there was none. The storage . . . in question" here arose because "it was entirely optional with defendant whether it would continue (under the earlier) method" or limit its shipments to its sales.¹²⁰ The delays were obviously at the shipper's door.¹²¹

The second point of interest is that "it is said that by collecting from the consignee the regular freight charges from the mines to destination, without demand of demurrage, the railroad company waived or became estopped to assert any demand against consignor, as owner, for this demurrage."¹²² The court answered with the *Fink*, and *Central Coal & Iron Co.* cases,¹²³ "which hold that no act of the carrier can estop it from enforcing

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.* 249.

¹²⁰ *Ibid.* 249.

¹²¹ On the methods of collecting demurrage, a recent federal decision covers the case of a ship unloading lumber into cars for transport to an ultimate buyer, Dorsey, who delayed starting the cars. Dorsey finally agreed to accept the delivery so far as the ocean carrier was concerned, but refused to pay the railroad demurrage charges which the ship itself had paid in order to be free to make delivery. The decision in *California & Eastern S. S. Co. v. 138,000 Feet of Lumber*, 23 F. (2d) 95, 96 (D. C. Md. 1927), is that a libel *in rem* against the lumber does not lie since the transaction "is one not relating to any charges connected with the vessel's services." Incidentally the court also characterized the payment of the charges by the ship as "voluntary," saying at 97, that, "A railroad normally, in the absence of special arrangement, would have no claim which it could assert against the vessel or her owner, because its rights would lie against the shipper or consignee of the lumber."

¹²² *Supra* note 117, at 249.

¹²³ *Pittsburgh, etc., Ry. v. Fink*, *supra* note 82; *Louisville & N. R. R. v. Cent. Iron & Coal Co.*, *supra* note 95.

payment of the full amount,"¹²⁴ and said that the bill of lading in the case made no exemption of the shipper.

B. Set-offs, etc., and the Statute of Limitations

Certain general policies in the law—such as that of set-off and the statute of limitations—may conflict with this obligation on the utility and user to collect and to pay the filed rate. As to set-off the present decisions are "in hopeless conflict."¹²⁵ In *Pennsylvania R. R. v. South Carolina Produce Association*,¹²⁶ where the carrier's demand for freight charges in interstate transportation was met by a counterclaim for damage to the shipment, the railroad demurred insisting that the claim "must be sued upon separately . . . because of the public policy inherent in the *Interstate Commerce Act*."

With this the court agreed. Judge Cochran said: "While . . . there is no Supreme Court decision directly in point, nevertheless I am of opinion that the principles laid down by the Supreme Court furnish a sufficient and logical guide by which we may reach a correct solution of the question."¹²⁷ It relied upon the Supreme Court's interpretation of section 6 in the *Mottley* case,¹²⁸ and the series following it. On the other hand, in *Chi-*

¹²⁴ *Supra* note 117, at 250.

¹²⁵ Cochran, D. J., in the case next cited, says, at 316:

"There is no decision directly in point by the Supreme Court of the United States, nor by any of the Circuit Courts of Appeals, and the decisions of the District Courts and of the state courts are in hopeless conflict. The following cases hold that the counterclaim may be lawfully interposed: *Wells-Fargo & Co. v. Cuneo* (D. C.) 241 F. 727; *Chicago & N. W. R. R. Co. v. Tecktonius Mfg. Co.* (D. C.) 262 F. 715; *Payne v. Clarke* (D. C.) 271 F. 525; *Battle v. Atkinson*, 9 Ga. App. 488, 71 S. E. 775; *Central, etc., v. Birmingham, etc.*, 9 Ala. App. 419, 64 So. 202; *Nashville, etc., v. Tennessee Mill Co.*, 143 Tenn. 237, 227 S. W. 443; *Penn. R. R. Co. v. Bellinger*, 101 Misc. Rep. 105, 166 N. Y. S. 652; *N. Y. Central R. Co. v. Federal Sugar Refining Co.*, 201 App. Div. 467, 194 N. Y. S. 467.

"The following cases hold that such a counterclaim cannot be interposed in an action of this character: *I. C. R. Co. v. Hoopes* (D. C.) 233 F. 135; *C. & N. W. R. Co. v. Stein* (D. C.) 233 F. 716; *Johnson-Brown Co. v. Railroad* (D. C.) 239 F. 590; *Oregon-Washington Railroad & Nav. Co. v. Cascade Contract Co.*, 101 Or. 582, 197 P. 1085, 1088, 200 P. 1034; *D., L. & W. R. R. v. Nuhs*, 93 N. J. Law, 309, 111 A. 223; *Adams Express Co. v. Albright Bros.*, 75 Pa. Super. Ct. 410; *N. Y. S. W. R. R. Co. v. Ruthven*, 88 Pa. Super. Ct. 510."

¹²⁶ 25 F. (2d) 315 (E. D. S. C. 1928).

¹²⁷ *Ibid.* 316.

¹²⁸ *Supra* note 71.

cago M. & St. P. Ry. v. Pioneer Grain Corp.,¹²⁹ Judge Sanborn, of the District Court in Minnesota, said, in denying a motion to strike out the counterclaim:

"At best the question is a very doubtful one. Granting that the plaintiff could not by any agreement with the defendant offset its cause of action against that of the defendant, does it necessarily follow that it would be unlawful or contrary to public policy that both causes of action should be submitted at the one time to the same court and the same jury and determined in the one action? It may be that no shipper should be permitted to set up a counterclaim in such a proceeding, but there seems to be no statutory prohibition of it; and if each cause of action is properly determined—and there is certainly no presumption that it will not be—it is difficult to see how discrimination will follow, or how the ultimate result will differ from what it would be if the causes of action were tried separately.

"In any event, and particularly in view of the fact that the cause of action set up as a counterclaim by the defendant cannot now be asserted in a separate action because of the running of the statute of limitations, it seems to me that the motion should be denied at this time. After a trial on the merits—if the defendant should prevail with respect to the counterclaim—the question now presented could be finally settled on appeal."

Where the claim for demurrage was met by a counterclaim for delay in an intrastate transit, a Missouri court, in *St. Louis S. F. Ry. v. Morgan*,¹³⁰ applied the general filed rate doctrines to the "legally published tariffs approved by the Public Service Commission of Missouri," and on the special problem of set-off agreed with Judge Cochran. He followed a prior decision which said:

"We held that estoppel could not be pleaded as a defense in an action by a carrier to recover a balance of transportation charges due on an interstate shipment. There we also considered by way of analogy the counterclaim

¹²⁹ 26 F. (2d) 90 (D. C. Minn. 1928).

¹³⁰ 297 S. W. 717 (Mo. App. 1927). It is discussed in (1928) 28 COL. L. REV. 112. The latter considers that the holding is not a sufficient bar to discrimination to justify the loss of economy.

question, and expressed our opinion as to the right to plead a counterclaim in such case. . . . and what we there said respecting the defense of counterclaim we think sound and more in keeping with the letter and spirit of the law denouncing unjust discrimination than are the cases to the contrary."¹³¹

Yet the *Commerce Act* provides for the application of the *Statute of Limitations* to the carriers' claims,¹³² although one might suppose that the general policies outlined here would oppose any time limit against the non-collecting carrier.

¹³¹ *Supra* note 130, at 718.

¹³² See legislation referred to *supra* note 110.